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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1478

ELLIPSE CORPORATION,
Petitioner,

v.

FORD MOTOR COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

Reference to the opinions below appears on pages 1 and 2 of the Petition.

JURISDICTION

The jurisdictional basis is set forth in the Petition.

QUESTIONS PRESENTED

A statement of the issues presented is set forth on pages 2 and 3 of the Petition.

STATUTORY PROVISIONS INVOLVED

The applicable statutory provisions are set forth on page 4 of the Petition.

STATEMENT OF THE CASE

This is a patent accounting proceeding in which the principal issue was one of determining a "reasonable

royalty" under 35 U.S.C. § 284. In a prior decision by the Seventh Circuit, claim 3 of patent No. 2,628,568 ("the Rhine patent") was held valid and liability was established. The case was remanded for this accounting to determine the damages to which Ellipse is entitled. *Ellipse Corp.* v. *Ford Motor Co.*, 452 F.2d 163 (7th Cir. 1971), *cert. denied*, 406 U.S. 948 (1972).

Upon remand, the District Court appointed a Special Master to conduct the accounting. Discovery, largely by Ellipse, was conducted in 1972, 1973 and 1974; trial before the Master commenced in early 1975 and, after numerous recesses, was completed in May, 1978. After the parties had completed their presentation of evidence, and because of the Master's precarious health, the District Court waived the filing of a report by the Master and assumed responsibility for the conduct of all further proceedings. Neither party offered any objection to the District Court's action. The District Court then reviewed the entire record before the Master. Hearings on exhibits were held on June 29, July 14, August 1 and August 18, 1978. After receiving briefs from both parties, the District Court ruled on the admissibility of all the exhibits. In addition, the District Court offered the parties the opportunity to present any additional testimony they might wish to offer; neither party did so. Thereafter, extensive post-trial briefs were filed and oral argument was heard by the District Court on September 5, 6 and 7, 1978. (A2, 13-14)

In a judgment entered on November 9, 1978, the District Court determined the reasonable royalty to which Ellipse is entitled to be 10¢ per pump. Taking into account certain credits in favor of Ford, the District Court awarded a final judgment to Ellipse in the net amount of $590,609.17. (A49, 60-61) The District Court also declared that each party should bear its own costs in the accounting, based upon its factual findings that "Ellipse has needlessly prolonged this litigation and added to the expense of this

accounting," and that were it not for Ellipse's conduct "the accounting proceedings could have been concluded within six months instead of six years." (A52, 54)

Ellipse appealed from the District Court's judgment, and Ford cross-appealed. After these appeals had been filed, Ellipse filed a motion under Civil Rule 60(b), seeking a revision of the District Court's factual finding that "after Ellipse had decided to sue Ford for infringement of the Rhine patent," Norman Lettvin, Ellipse's trial counsel, and Maurice Rosenfield, another of Ellipse's attorneys, purchased stock interests in Ellipse of 25% and 39%, respectively, and that "[a]s a result of these transactions, the two lawyers obtained a controlling 64% interest in Ellipse." (A16, 21) Mr. Rosenfield also filed a motion seeking to intervene personally for the purpose of contesting the same factual findings. Both Ellipse and Mr. Rosenfield appealed from the District Court's denial of these motions.

In a judgment entered on December 21, 1979 the Seventh Circuit affirmed the District Court's denial of the above motions, and affirmed in all respects the District Court's judgment on the issue of a reasonable royalty. (A6-7) Ellipse's President, Simon Moss, subsequently sent two letters to the members of the appellate panel. The Seventh Circuit treated these letters as motions for reconsideration, and denied both of them. (A10-11)

REASONS RELIED UPON FOR DENIAL OF THE WRIT

Pursuant to Rule 19, "special and important reasons" must be demonstrated in support of a petition for a writ of certiorari. Importance, in this context, relates to issues "the settlement of which is of importance to the public as distinguished from that of the parties." *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). *See Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955) (quoting *Layne & Bowler*).

Thus, a petition is inappropriate when review is sought of a lower court decision which turns upon an analysis of particular facts. *United States* v. *Johnston,* 268 U.S. 220, 227 (1925). That is especially true when the factual findings by the District Court receive the concurrence of the Court of Appeals. *Graver Tank & Mfg. Co., Inc.* v. *Linde Air Prods. Co.,* 336 U.S. 271, 275 (1949).

Ellipse has ignored these basic principles in presenting the instant Petition. Ellipse does not contend that any of the issues present a conflict between the decision of the Seventh Circuit and that of another Circuit, or that the Seventh Circuit has decided an important question of federal law which has not been, but should be, decided by this Court. Rather, Ellipse apparently contends that the Seventh Circuit's decision is in conflict with decisions of this Court, and with an earlier decision of the Seventh Circuit during the liability phase of this same case.

As discussed below, no true conflicts are presented by the instant Petition. On the contrary, the contested aspects of the Seventh Circuit's decision were premised upon specific factual findings and correct applications of well-settled law by the District Court. The matters raised by Ellipse are non-issues, and are clearly not of the public importance that would warrant review by this Court.[1]

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[1] In affirming the District Court through an unpublished order, the Seventh Circuit itself concluded that this case involved no issues of general interest or importance. Under Seventh Circuit Rule 35(c)(2)(ii), unpublished orders containing a summary of reasons for the decision are issued in appeals which "present arguments concerning the application of recognized rules of law, which are sufficiently substantial to warrant explanation but are not of general interest or importance." Ellipse's contention that the Seventh Circuit issued an unpublished order because it "wanted to avoid embarassment" (Petition at 14) is both frivolous and unwarranted.

A. The Seventh Circuit's Decision Does Not Conflict With Any Decisions of This Court, or With the Seventh Circuit's Decision During the Liability Phase.

Ellipse contends that three aspects of the Seventh Circuit's decision are in conflict with its earlier decision during the liability phase of this case, and thus in conflict with this Court's "law of the case" ruling in *In re Potts,* 166 U.S. 263 (1897), *overruled, Standard Oil Co. of California* v. *United States,* 429 U.S. 17 (1976). It is apparent, however, that the Seventh Circuit merely affirmed on the basis of specific factual findings and correct applications of law by the District Court.

1. There Is No Merit In Ellipse's Argument Concerning the Nature of the Infringement

The Seventh Circuit observed that "[t]he district court considered . . . that the pumping element of the defendant's pump (the only portion covered by the Rhine patent) cost about $2.50." (A5) Ellipse contends that this observation is in conflict with the Seventh Circuit's decision during the liability phase which found that the entire power-steering pump, not just the pumping element, constituted an infringement. (Petition at 13-15)

With respect to damages – the only issue involved in this phase of the case – the Seventh Circuit's observation might have significance if the District Court had assessed damages on the basis of the pumping element as opposed to the pump as a whole. That, however, is not the case. On the contrary, the District assessed a reasonable royalty for the entirety of the power-steering pump, based upon careful consideration of numerous factors bearing upon the market value of a license under Ellipse's patent.

In addition to the above-quoted observation, the Seventh Circuit listed the following among many factors considered by the District Court in determining the amount of the reasonable royalty:

The district court considered, among many other things, that the pumping element of the defendant's pump (the only portion covered by the Rhine patent) cost about $2.50; that the defendant could have originally purchased an almost equivalent pump for 9 cents more through General Motors; that defendant was able to manufacture the infringing pump for a "few pennies" less than alternative pumps then available; that defendant's customers do not purchase Ford automobiles based on the particular pump used in the power steering systems; that defendant was paying less than 1% for royalties on high volume items to be used in its automobiles; that the plaintiff had no facilities or employees, its only asset being the Rhine patent; that no one had ever obtained or requested a license from plaintiff, and it had absolutely no bargaining power other than the patent; that in the automotive field a royalty is usually expressed as a lump sum or a fixed amount per unit; that in the case of other automobile component parts the defendant had paid or was paying 4/10%, 1/10%, 5/10%, 45/100%, 12/100%, and 5/10%; that other pump royalties paid by others were 7-7/10 cents and 8½ cents per unit; and other criteria. (A5)

Each of these factors has direct relevance to determining a reasonable royalty for the entire power-steering pump, and not just the pumping element. Nothing in the decision of the District Court, or that of the Seventh Circuit, suggests that the amount of the reasonable royalty was determined on the basis of the pumping element alone.

Moreover, the District Court's observation concerning the cost of the pumping element was clearly in accord with the applicable law. Although the entire power-steering pump produced by Ford was found during the liability phase to be an infringement, the only infringing aspect of the pump was the pumping element component. (See Finding 4; A14-15) The fact that the entire pump contained components and parts not attributable to the patent was a proper consideration for the District Court, among

many other factors, in determining the amount of the reasonable royalty. In *Georgia-Pacific Corp.* v. *United States Plywood Corp.*, 318 F. Supp. 1116 (S.D. N.Y. 1970), *modified on other grounds*, 446 F.2d 295 (2d Cir.), *cert. denied*, 404 U.S. 870 (1971), the court presented a comprehensive list of factors relevant to determining a reasonable royalty under 35 U.S.C. § 284. Among those factors was the extent of value that should be attributed to the patent "as distinguished from non-patented elements, the manufacturing process, business risks, or significant features or improvements added by the infringer." 318 F. Supp. at 1120. Significantly, the District Court's finding concerning the relative cost of the pumping element was based in part upon an exhibit offered by Ellipse, and in part upon findings proposed by Ellipse at the liability trial. (A39)

Thus, there is no conflict between the Seventh Circuit's decisions during the liability and accounting phases of this case, and no issue of substance to be reviewed by this Court.

2. There Is No Merit In Ellipse's Argument Concerning Pre-Judgment Interest

The final judgment of the District Court during the liability phase directed an accounting "to determine the amount of the damages including interest from the dates when the damages accrued." (A64) Ellipse contends that this statement became the "law of the case," precluding the District Court's later determination that Ellipse was not entitled to pre-judgment interest. (Petition at 15-17)

This same argument was presented to, and rejected by, both the District Court and the Seventh Circuit. Those courts correctly held that interest on a judgment for patent infringement runs or accrues only from the date that the damages are liquidated, which occurs, in the case of damages based upon a reasonable royalty, upon entry of

the court's judgment determining the amount thereof. *Union Carbide Corp.* v. *Graver Tank & Mfg. Co.*, 282 F.2d 653, 677 (7th Cir. 1960), *cert. denied*, 365 U.S. 812 (1961) (citing *Duplate Corp.* v. *Triplex Safety Glass Co.*, 298 U.S. 448 (1936)); *Wahl* v. *Carrier Mfg. Co., Inc.*, 511 F.2d 209, 215 (7th Cir. 1975). An exception to this rule is that pre-judgment interest may be awarded in "exceptional cases" upon a clear showing of bad faith or fraud. *Columbia Broadcasting System* v. *Zenith Radio Corp.*, 537 F.2d 896 (7th Cir. 1976). Both the District Court and the Seventh Circuit held that "exceptional circumstances are not present here." (A6, 58)

Ellipse argues that the District Court's order for an accounting "to determine the amount of damages including interest from the dates when the damages accrued" determined the issue of pre-judgment interest. However, the District Court clearly did not hold that Ellipse's damages "accrued" upon infringement. Rather, the court's order provided only that interest should be awarded "from the dates when the damages accrued." "Accrued," when used in the context of "damages accruing," refers to the time when the damages are liquidated or become a sum certain. *See United States* v. *Safety Car Heating & Lighting Co.*, 297 U.S. 88 (1936) (holding for income tax purposes that damages for patent infringement had not accrued as long as the amount thereof remained contested and uncertain). *See also Hart Metal Prods. Corp.* v. *Commissioner*, 437 F.2d 946 (7th Cir. 1971).

It is obvious that the District Court's pre-accounting order was not intended to determine the issue of pre-judgment interest or to change the applicable law. By the very terms of the order Ellipse's damages became "accrued" only upon entry of the District Court's judgment establishing the amount of damages payable as a reasonable royalty. Thus, the District Court and the

Seventh Circuit were clearly correct in rejecting Ellipse's "law of the case" argument on the issue of pre-judgment interest.

3. There Is No Conflict With *Wine Railway*

Both the District Court and the Seventh Circuit found that Ford was liable to account only for those pumps which it sold subsequent to the filing of the lawsuit because Ellipse had failed to comply with the marking and notice requirements of 35 U.S.C. § 287. Ellipse contends that this conclusion is in conflict with *Wine Ry. Appliance Co.* v. *Enterprise Ry. Equip. Co.*, 297 U.S. 383 (1936), which held that a non-manufacturing patentee need not comply with the marking requirements of section 287. (Petition at 17-19)

That contention is falacious. The Seventh Circuit did not in any way either reject or repudiate the rule of *Wine Railway;* its decision merely held that the rule does not apply here on the basis of specific factual findings of the District Court. (A3-4)

The decision in *Wine Railway* was premised upon the fact that neither the patentee nor another with its consent had ever manufactured an article under the patent, even in limited quantities, and thus the patentee could not be charged with neglect in failing to mark. Moreover, the *Wine Railway* Court was concerned that by "secret" infringement of the patent a defendant could deprive the patentee of any opportunity to provide actual notice of infringement, and that to disallow pre-complaint damages under such circumstances would be inequitable. 297 U.S. at 393-95. As such, the holding in *Wine Railway* has always been understood to apply only in the case of a "passive owner of an entirely unexploited patent." *Hazeltine Corp.* v. *Radio Corp.*, 20 F. Supp. 668, 673 (S.D.N.Y. 1937). *See Gordon* v. *Easy Washing Mach. Corp.*, 39 F. Supp. 202, 203 (N.D.N.Y. 1941).

The District Court correctly found that the facts on which the *Wine Railway* decision was based were not present in this case. The Court held that *Wine Railway* "is not controlling here," finding as fact that "Ellipse did market two pumps which, by its own admission, came under the Rhine patent and it has presented no evidence that it marked them in accordance with the statute." The District Court further found that Ellipse had ample opportunity to give actual notice of infringement to Ford, but that "[h]aving withheld such notice, when it plainly could have been given, Ellipse cannot now escape the consequences of its actions."[2] (Finding 6, A18)

On appeal, Ellipse presented its same "law of the case" argument to the Seventh Circuit. That Court rejected the argument, and affirmed on the basis of the specific factual findings of the District Court. (A3-4)

Ellipse now seeks, under the guise of legal argument, to obtain review of the District Court's factual findings by this Court. As shown above, however, the District Court's judgment is not in conflict with *Wine Railway*, but represents a determination that the rule of that case does not apply under the particular facts presented herein. Ellipse's "law of the case" argument, considered and rejected by the Seventh Circuit, presents no issue warranting review by this Court.

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[2] Ellipse relies upon certain findings of the District Court during the liability phase in contending that Ford had actual notice prior to the filing of the lawsuit. (Petition at 12; A66, 91) Those findings were reversed as involving "manifest error" by the Seventh Circuit when it reversed the District Court's award of attorney's fees. (A106) In the accounting phase, the District Court correctly found that Ford did not have notice prior to suit. (A18) That finding was affirmed by the Seventh Circuit. (A3-4)

B. Ellipse's Equal Protection Argument Has No Merit

Ellipse contends that the District Court's application of 35 U.S.C. § 284, which governs the damages to be awarded for patent infringement, denied Ellipse equal protection of law. (Petition at 20-25) Ellipse's argument, although couched in terms of constitutional issues, in reality again seeks review by this Court of the factual findings and determinations of the District Court.

Ellipse contends that the District Court recognized two rules of law, one applicable to a patentee who "had an established practice of maintaining the patent monopoly to himself for his own exploitation and profit," and another rule applicable to all other patentees. That contention is plainly wrong. The District Court applied only one rule of law, the "willing buyer – willing seller" rule, which has been universally recognized as the correct approach to determining a reasonable royalty under 35 U.S.C. § 284. *See Horvath* v. *McCord Radiator & Mfg. Co.*, 100 F.2d 326, 335 (6th Cir. 1938), *cert. denied*, 308 U.S. 581 (1939); *Union Carbide Corp.* v. *Graver Tank & Mfg. Co.*, 282 F.2d 653, 669 (7th Cir. 1960), *cert. denied*, 365 U.S. 812 (1961); *Foster* v. *American Mach. & Foundry Co.*, 492 F.2d 1317 (2d Cir.), *cert. denied*, 419 U.S. 833 (1974); *Georgia-Pacific Corp.* v. *United States Plywood-Champion Papers, Inc.*, 446 F.2d 295 (2d Cir.), *cert. denied*, 404 U.S. 870 (1971). *See also Egry Register Co.* v. *Standard Register Co.*, 23 F.2d 438 (6th Cir. 1928); *A. Mecky Co.* v. *Garton Toy Co.*, 277 F. 507 (E.D. Wisc. 1921); *W. L. Gore & Assoc., Inc.* v. *Carlisle Corp.*, 198 U.S.P.Q. 353 (D. Del. 1978). The District Court merely recognized, in the application of this single rule of law, that the actual damages suffered by patentees will vary with the factual circumstances. *See Enterprise Mfg. Co.* v. *Shakespeare Co.*, 141 F.2d 916, 920 (6th Cir. 1944) ("In an accounting for damages for infringement, each case is controlled by its own peculiar facts and circumstances.").

The willing buyer – willing seller rule is a method of compensating the patentee for the actual damages caused by the defendant's infringement. As the District Court and the Seventh Circuit correctly recognized, the actual damage suffered by a patentee who has an established market and a practice of maintaining the patent monopoly to himself may be far different from the damages suffered by a patentee who has no market and no ability to exploit the patent at a profit. By analogy, the damages awarded to a young surgeon who loses an arm through a defendant's negligence will greatly exceed the damages awarded to a 65 year old retiree who has suffered a similar injury. In that context, as in the case of a reasonable royalty determination, the rule of law of damages remains the same; only the result varies depending on the facts of the case.

In affirming the District Court's determination of a reasonable royalty in the present case, the Seventh Circuit correctly found that "the willing buyer-willing seller rule contemplates a suppositious meeting in advance of infringement between patent owner and potential infringer in order to work out a license agreement," *Georgia-Pacific Corp.* v. *U.S. Plywood-Champion Papers, Inc.*, 446 F.2d 295, 296-97 (2d Cir. 1971), *cert. denied*, 404 U.S. 870 (1971), and that the District Court "carefully and in explicit detail reconstructed the situation prior to the infringement to determine a reasonable royalty." (A4-5) That the District Court considered all factors relevant to that determination is evident from the above-quoted listing of those factors by the Seventh Circuit. (A5)

Through its strained and unpersuasive "constitutional" arguments, Ellipse seeks a review of the District Court's factual findings which were affirmed by the Seventh Circuit. The District Court's application of section 284 under the particular facts of this case clearly does not present an issue warranting review by this Court.

C. Ellipse's Due Process Argument Has No Merit

After the close of proofs in the accounting, the Master became ill and the District Court assumed the task of determining a reasonable royalty on the basis of all of the evidence which the parties had presented or wished to present. Ellipse contends that the Seventh Circuit's conclusion that this procedure resulted in no prejudice to Ellipse is in conflict with its earlier decision in *Smith* v. *Dental Prods. Co., Inc.*, 168 F.2d 516 (7th Cir. 1948), which recognized that the courts must be cognizant of the due process rights of the parties in such a situation. (Petition at 25-28) Here again, the Seventh Circuit's holding was not in conflict with its earlier decision or with decisions of this Court, but represents a correct application of rules of law under the particular facts of this case.

In rejecting the identical argument now advanced by Ellipse in its Petition, the Seventh Circuit noted that the District Court had carefully considered the due process rights of the parties and took appropriate steps to obviate any possibility of prejudice:

> Upon remand for an accounting, the court appointed a special master, who conducted some 250 trial sessions producing 231 volumes of transcript totalling over 19,500 pages. When the special master became ill and underwent surgery and after he had closed proofs, the district court relieved him of his duties and undertook the case personally. Neither party objected to that procedure. The parties were ordered to resubmit all of their exhibits and to reargue their admissibility and were given the opportunity to present additional evidence before the court; the court reviewed the entire record of the proceedings before the special master, considered briefs filed by the parties, together with proposed findings and conclusions, and heard oral argument. (A2)

The Seventh Circuit concluded that "[a]lthough, on appeal, the plaintiff has complained of this procedure, it has

raised no issues which depend upon the credibility of the witnesses. For this reason and because of plaintiff's failure to object in timely fashion, we find no merit in plaintiff's argument of this issue." (A3) *See W.R.B. Corp.* v. *Geer*, 313 F.2d 750, 752-53 (5th Cir. 1963), *cert. denied*, 379 U.S. 841 (1964); *D.M.W. Contracting Co.* v. *Stolz*, 158 F.2d 405, 407 (D.C. Cir. 1946), *cert. denied*, 330 U.S. 839 (1947).

The Seventh Circuit was clearly cognizant of the fact that Ellipse's argument would entail resubmission of all of the evidence in the accounting which, because of Ellipse's conduct, had taken six years to complete the first time. The Seventh Circuit correctly concluded that such a result was unnecessary under the facts of this case because the District Court's assumption of responsibility for the case in view of the Master's health had resulted in *no prejudice to Ellipse*. There is no reason, much less a "special and important" reason, why the Seventh Circuit's ruling need be reviewed by this Court.

CONCLUSION

The issues raised by Ellipse in support of its Petition exhibit none of the factors that would warrant review by this Court. Ellipse does not contend that the Seventh Circuit's decision is in conflict with that of another Circuit or that this case presents an important question of federal law which has not been but should be decided by the Court. Moreover, there are no conflicts between the Seventh Circuit's decision and prior decisions of this Court. Ellipse merely seeks, under the guise of "legal" and "constitutional" arguments, to obtain review of factual findings by the District Court which have received the concurrence of the Seventh Circuit. These are non-issues and present no question of public importance.

For the foregoing reasons, Respondent respectfully suggests that the Petition be denied.

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